

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID ZAIRE,

Petitioner,

DECISION AND ORDER

04-CV-6217L

v.

CALVIN E. WEST,

Respondent.

This Court referred the petition of David Zaire (“Zaire”) under 28 U.S.C. § 2254 to United States Magistrate Judge Victor E. Biachini for a Report and Recommendation on the petition, pursuant to 28 U.S.C. § 636(b). Magistrate Judge Bianchini issued a thorough Report and Recommendation (Dkt. #17) recommending that the Court deny and dismiss the petition. Zaire filed objections (Dkt. #18) on October 27, 2008. I see no reason to alter or modify the Report and Recommendation, and I adopt and accept it in its entirety.

I have considered the arguments advanced by Zaire in the petition and in his objections, as well as Magistrate Judge Bianchini’s resolution of those matters in his Report and Recommendation.

Zaire seeks relief pursuant to § 2254 in connection with the decision of the New York State Department of Correctional Services to deny him 10 years “good time” because he failed to enroll and complete a treatment program for sexual offenders. Zaire’s conviction in 1983 was for sexual

offenses, namely rape and sodomy. Zaire now contends that requiring him to admit guilt as part of the treatment program violates his Fifth Amendment rights against self-incrimination.


Magistrate Judge Bianchini carefully considered the respondent's contention that the petition should be dismissed because Zaire failed to exhaust his claims in the state courts. I agree with Magistrate Judge Bianchini's analysis and find that Zaire failed to appeal the denial of his Article 78 petition and, therefore, he has procedurally defaulted on the claim. Furthermore, Zaire has failed to demonstrate that he should be excused from his clearly established procedural default.

Magistrate Judge Bianchini also considered the merits of Zaire's petition. He found that assertion of the Fifth Amendment was not availing. Zaire did not raise a viable Fifth Amendment claim since there was no real possibility that he would be charged with sexual misconduct, should he admit guilt, because he had already been convicted of the sexual matters at issue and his appeal and right to bring collateral proceedings have long since concluded.

CONCLUSION

I accept and adopt the Report and Recommendation (Dkt. # 17) of United States Magistrate Judge Victor E. Bianchini. The petition of David Zaire for relief pursuant to 28 U.S.C. § 2254 is denied and the petition is dismissed. Furthermore, I find petitioner has failed to make a substantial showing of a denial of a constitutional right and, therefore, I deny the certificate of appealability.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "David G. Larimer", is written over a horizontal line.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
November 6, 2008.